

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

KENNETH SMITH,

Petitioner,

-vs-

FRANCISCO PINEDA, Warden,

Respondent.

:

Case No. 1:12-cv-196

:

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

:

ORDER FOR RESPONSE

This capital habeas corpus case is before the Court for initial review upon filing. Petitioner previously filed a habeas corpus action in this Court challenging the same conviction which is at issue here (Case No. 1:99-cv-832). The final judgment of this Court denying relief has been affirmed on appeal by the Sixth Circuit. *Smith v. Mitchell*, 567 F.3d 246 (6th Cir. 2009). The Supreme Court subsequently denied certiorari. *Smith v. Mitchell*, 130 S. Ct. 742 (2009). Petitioner's execution has been stayed by Judge Frost of this Court in the parallel § 1983 litigation to which Petitioner is a party. *Prima facie*, then, it would appear that this is a second or successive petition of which this Court would not have jurisdiction in the absence of permission from the Sixth Circuit. 28 U.S.C. § 2244(b); *Burton v. Stewart*, 549 U.S. 147 (2007).

Petitioner, however, makes an extended argument as to why this is not a second or successive petition (Petition, Doc. No. 1-2, PageID 45-48). The Court finds it inappropriate to decide that question in the first instance without giving the Ohio Attorney General an opportunity to respond.

Accordingly, it is hereby ORDERED that Respondent file any argument he wishes the Court to consider on the question whether the Petition herein is a second or successive petition on which Petitioner requires the prior permission of the Sixth Circuit to proceed not later than March 19, 2012. March 9, 2012.

s/ **Michael R. Merz**
United States Magistrate Judge

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